IN THE

Supreme Court of the United States.

OCTOBER TERM, 1922,

No.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, *Appellant*,
vs.
W. H. OSBORNE, JR., as State Tax Commissioner of the State of Nebraska, et al., *Appellees.*

Docket No. 863.
File No. 29413.

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY, *Appellant*,
vs.
W. H. OSBORNE, JR., as State Tax Commissioner of the State of Nebraska, et al., *Appellees.*

Docket No. 864.
File No. 29414.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

BRIEF OF APPELLANTS.

STATEMENT OF THE CASE.

This is an appeal from the District Court of the United States for the District of Nebraska, from an order entered by the court, consisting of three judges sitting pursuant to Sec. 266, Judicial Code, denying to

appellants temporary injunction against thirty-seven county treasurers of the counties through which appellants' lines of railroad operate in Nebraska, from collecting a certain percentage of taxes which had been levied against appellants for the year 1922. The injunction was denied upon the ground:

> "That plaintiff for the redress of the wrongs recited in its petition, had an adequate remedy at law, under the statutes of the State of Nebraska, in prosecuting error proceedings to the Supreme Court of the State of Nebraska and for that reason there is no equity in the application for a temporary injunction." (Rec., 27.)

Appeal has been taken direct to this court under Sections 238 and 266 of the Judicial Code.

By stipulation of the parties, duly filed in this court, the two cases are consolidated for hearing upon a common brief and common argument because the legal question involved is identical in each case, namely, whether or not there was an adequate and complete remedy at law to appellant by way of error proceedings to the State Supreme Court so as to deprive the Federal District Court of jurisdiction to pass upon the merits of the case.

For the sake of brevity the Chicago and North Western Railway Company will be hereafter referred to as the North Western Line, and the Chicago, St. Paul, Minneapolis and Omaha Railway Company will be hereafter referred to as the Omaha Line. References to pages of the record will be to the record in the C. & N. W. case, except where otherwise indicated.

The question presented by these appeals arose in the following manner:

Under the statutes of Nebraska property generally, other than railroad property, is assessed by the county

assessor and that assessment is equalized, in the first instance, by the county board of equalization; while railroad property, other than property of a purely local nature, is assessed by the State Board of Equalization and Assessment by first finding the total value of the property of the railroad company in the state and then dividing that total value by the number of miles of railroad in the state, thus arriving at a mileage valuation for taxing purposes; and this valuation per mile is then certified to the various taxing units, such as counties, school districts, etc., within the state as the basis for the tax levy. This valuation of railroad property is made by the State Board of Equalization and Assessment, on the first Monday of May in each year (Section 5840) and the valuation per mile is promptly certified to the county clerk of each county in which the road runs, as the basis for the tax levy in each taxing district. The statutes provide: (Section 5901) That on the first Monday of July of each year the State Board of Equalization and Assessment shall sit as a Board of Equalization to equalize assessments as between counties. Prior to that time the statute contemplates that the county clerk of each county shall have certified to the state board an abstract of all assessments made within the county, including the assessment which has theretofore been certified to the county clerk by the state board showing the per mileage valuation of the railroads, and it is upon these abstracts received from the various counties, the action of the State Board of Equalization and Assessment as an equalizing board is taken.

In the petitions in equity filed in the District Court it is alleged (Rec., 4):

> "That this is a suit in equity to enjoin the collection of illegal taxes against the plaintiff; that said taxes are illegal because the property of the plaintiff has been valued for taxing purposes at more

than its true value, while the property of all other taxpayers in the state, and particularly real estate, has systematically and intentionally and continuously been valued at only a fraction of its true value, thereby resulting in a discrimination against the plaintiff and depriving the plaintiff of equal protection of the law in violation of the Constitution of the State of Nebraska and the laws of the state, and in violation of the Fourteenth Amendment to the Constitution of the United States."

As to the North Western Line the state board, at its meeting in May, 1922, as an assessing board, fixed the value of the company's property in the state at $38,714,373 and found the mileage to be 1,062.56 miles, thus giving a per mile valuation of $36,475 (Rec., 8); while the railway company alleged in its petition in equity that the value of its property in the state does not exceed $32,100,000 and that the value per mile does not exceed $29,129. (Rec., 46.)

The board fixed the value of the property of the Omaha Line for taxation purposes at $12,392,905 and found the mileage to be 303 miles, making a valuation per mile of $40,900 (Omaha Rec., 7), while the company claimed that its value did not exceed $7,000,000 in the state, and that the value of its line per mile did not exceed $21,691. (Omaha Rec., 47.)

It was alleged in both petitions that the valuation of all other property, and particularly farm property in the state, as fixed by the assessors and as equalized by the state board, did not exceed 60 per cent of the true value thereof.

Appellants appeared before the State Board of Equalization and Assessment at its meeting in July, 1922, and asked that they be placed on a basis of equality with the valuation fixed for other property in each county through which their lines of road operate, that is, that

they be not assessed at a higher percentage of the true value of their property than the percentage enjoyed by other taxpayers in said counties. (Rec., 88.) Considerable evidence was offered before the State Board of Equalization and Assessment to show the discrimination against appellants as compared with other taxpayers (Rec., 89 to 270), but the applications were denied. (Rec., 270.)

Appellants contend that this action of the State Board of Equalization and Assessment finally ended the procedure provided by law for fixing the value of appellants' property for taxing purposes, thus leaving appellants free to litigate the question of the validity of the valuations fixed, and for that purpose appellants resorted to a Federal Court of Equity, there being present diversity of citizenship and the requisite jurisdictional amounts involved as well as the claim of a federal question.

The trial judges in denying the application for a temporary injunction did so upon the assumption and statement that the following statutes afford to appellants a full, complete and adequate remedy at law by way of error proceedings to the Supreme Court of the state.

The statutes relating to the duties and powers of the State Board of Equalization are as follows (Compiled Statutes of Nebraska, 1922):

Section 5898:

> "The Governor, Secretary of State, State Auditor, State Treasurer and Tax Commissioner are hereby constituted the State Board of Equalization and Assessment. The Tax Commissioner shall be Secretary of said board, and as such perform such duties as may devolve on him by law or the rules and regulations of the board. He shall have authority to administer oaths and affirmations and to call

special meetings of the board at such times as its business may require."

Section 5899:

"The Governor shall be ex-officio chairman of such board, and preside at all meetings when present. In the absence of either the president or secretary, their places may be filled temporarily by other members of the board. Three members shall constitute a quorum for the transaction of business."

Section 5900:

"The Board shall have a seal, with which all orders, certificates and process shall be attested. The Board shall provide a uniform method of keeping all books relating to taxation in the several counties of the State."

Section 5901:

"The State Board of Equalization and Assessment shall, on the first Monday of July of each year, meet at the State Capitol for the purpose of equalizing assessments. They shall proceed to examine the abstract of property assessed for taxation in the several counties of the State, including the railroads entirely within such county, and all other property, and shall equalize such assessment so as to make the same conform to law, and for that purpose they shall have the power to increase or decrease the assessed valuation of any county or tax districts, and such increase or decrease shall be made by a percentum, and the per cent of increase or decrease when made shall be certified to the county clerk of the proper county, who shall thereupon add to or deduct from the assessment of each piece or parcel of property in the county affected an amount equal to the per cent of increase or decrease fixed by the State Board. The State Board shall have the power, in equalizing assessments, to increase or decrease the assesed valuation of any class, classes or kinds of property in any county or tax district, whenever in their judgment it shall be necessary to make such assessment conform to law; and such increase or decrease, when made, shall be certified to the county clerk and by the county clerk

extended upon the tax rolls as hereinbefore provided; but in the extension of valuation the county clerk shall reject all such amounts as may fall below $2.50, and all amounts of $2.50 or more shall be extended as the next higher $5.00 or multiple thereof, thus making all valuations end in cipher or five. In the event it shall appear to the State Board of Equalization and Assessment that a just, equitable and legal assessment of the property in the State cannot be made without increasing or decreasing the valuation as returned by any county, the Board of Equalization and Assessment shall issue a notice to the counties which the Board deems either undervalued or overvalued and shall set a date for hearing at least five days following the mailing of such notice. At such hearing legal representatives of the counties may appear and show cause why the valuation or valuations of their counties should not be increased or decreased by the State Board, and after a full hearing, the State Board shall enter its order and certify the same to the County Clerks of the proper counties as hereinbefore set forth in this section. The notice provided for in this section shall be mailed to the county clerk, county assessor, and chairman of the county board. From any final decision of the State Board of Equalization and Assessment, any person, county or municipality affected thereby may prosecute a writ of error to the Supreme Court and upon demand therefor the State Board shall prepare and certify a transcript of its records and proceedings involved in such decision, upon payment by the party demanding the same of a fee of ten cents for each one hundred words. Notice of intention to obtain a review shall be filed within ten days from the date of the entry by the Board, and when docketed, said cause shall be given precedence by the Supreme Court over all civil cases."

It was upon the last two sentences of *Section* 5901 just quoted that the trial court based its conclusion that there was an adequate remedy at law by way of error proceedings to the State Supreme Court. There has never been any decision by the Supreme Court of Nebraska

construing the language of this Section. Appellants contend that this section not only affords no remedy at all but that whatever remedy is contemplated is neither adequate, full nor complete so as to deprive a federal court of equity of jurisdiction to hear the case on its merits.

This conclusion of the trial court was reached after a fairly complete hearing on the merits, and, in order to protect appellants pending the appeal, temporary injunctions were issued requiring the North Western Company to pay 75 per cent of the taxes withheld, which has been done. A bond was given for $150,000 to protect the public in the event the appeal should be unsuccessful. The Omaha Company was required to pay 60 per cent of the taxes, which was done, and a bond was given for $75,000 pending the result of the appeal.

Proof of Overvaluation and Discrimination.

1. *Overvaluation of Appellant's Property.*

Proof of value of the North Western Line property is embodied in the affidavit of C. F. Balch, its Assistant General Auditor. (Rec., 48-57.) Proof of value of the property of the Omaha Line is given in the affidavit of Charles Jensch, its Comptroller. (Rec., 74-84.)

As the method of arriving at the valuation is the same in both affidavits, we will briefly refer to that of Mr. Balch. Attached to this affidavit are seven exhibits, which are explained in the affidavit.

In Exhibit 1 the value of the entire line of the North Western Company is set forth, covering a period of six years ending with 1921, based upon (1) par value of stocks and bonds; (2) market value of stocks and bonds; (3) Nebraska railway operating income capitalized at

six per cent; (4) annual rental paid by the Government during the period of federal control capitalized at six per cent, and (5) the amount allowed by the Interstate Commerce Commission in the proceeding known as *Ex Parte* 74. Upon the bases of these five elements an average valuation was obtained for the entire line of $345,608,727, and a value per mile of road of $42,136.

In Exhibits 2 to 6 the values arrived at in Exhibit 1 are separately apportioned to the State of Nebraska upon six bases, namely, upon the basis of (1) railway operating revenues in Nebraska; (2) miles of line operated in Nebraska; (3) miles of all track operated in Nebraska; (4) transportation train miles in Nebraska; (5) traffic units in Nebraska, being the tons one mile of revenue freight carried and passengers carried one mile, and (6) use of property in Nebraska, being based upon the valuation of locomotives, passenger cars, freight cars, work cars, and all other equipment properly allocated to Nebraska. This method is applied to each of the five bases of value set forth in Exhibit 1.

A sumary of all the preceding exhibits is then set forth in Exhibit 7 by which the average valuations year by year upon the five elements considered in Exhibit 1 are themselves average over such period. The highest average valuation found was in 1916, when it was $35,739,615, and the lowest was in 1920, when it was $28,528,213. The average for the six-year period was $32,088,874, or $29,129 per mile of road operated in Nebraska.

The reasons why the valuation per mile of road in Nebraska is less than the average for the entire line are fully set forth in Mr. Balch's affidavit already referred to, and also in Exhibit 1-a, being another affidavit by Mr. Balch used in the 1921 tax hearing and received in evidence in this case.

Such reasons are set forth in detail by Mr. Balch and show that the company had much more valuable real estate in other states, more miles of double and additional tracks in other states, and larger earning power in other states, and various other reasons amply supporting the reduced valuation per mile in Nebraska.

The State Board of Equalization fixed the North Western Line valuation at $38,714,373, or $36,475 per mile of road in Nebraska.

In the Omaha Line case Mr. Jensch (Rec., 74-84) pursued substantially the same method as that used by Mr. Balch in the North Western Line case, except that Mr. Jensch used five years (1917 to 1921) instead of six years. The recapitulation of the tables prepared and used by Mr. Jensch (Omaha Ex. 7. Opp. Rec., 84) shows an average valuation of the Omaha Company property in Nebraska of $6,689,455, or $21,691 per mile of road in that state.

The State Board of Equalization fixed the Omaha Line valuation at $12,392,906, at the rate of $40,900 per mile of road in Nebraska.

No conflict as to the accuracy of the statistics used by Mr. Balch and Mr. Jensch appears in the record, nor did the defendants challenge the propriety of the method adopted by these experts. Substantially the only evidence offered by appellees was the affidavit and testimony of U. G. Powell, chief accountant of the Nebraska State Railway Commission. (Rec., 276, 279-292.) Mr. Powell submitted two exhibits. (Rec., 281-286.) He took the report made by the North Western Company to the Nebraska State Railway Commission in 1909 of the valuation of its property in Nebraska and added thereto the amounts stated in the subsequent annual reports of that company of additions and betterments to its prop-

erty. He then added five per cent to this total for working capital, materials and supplies, and by this method reached a total of $61,714,310. By the same process of addition he reached a total as to the Omaha Line of $14,480,465.52. (Rec., 284-286.)

Just what these figures represent is not made to appear. Mr. Powell testified (Rec., 288) that he was not to be understood as saying that these figures represented values; that it was merely a tabulation; and that it was difficult to say what the valuation was.

At the conclusion of the trial and in the course of the argument the following colloquy occurred between the court and Mr. Lamaster, counsel for appellees (Rec., 309):

> "Judge Lewis: Do I understand you to state that the M. & O. is taxed disproportionately.
>
> Mr. Lamaster: The M. & O. is taxed disproportionately. I figured in the other case that it was probably taxed at—that is, there was a difference of about fifteen per cent more as to the M. & O. as compared to the North Western. That is, assuming that the North Western was taxed at 75 per cent of its value, the M. & O. was taxed at about 90 per cent. Of course, that was only an estimate but it was somewhere in that neighborhood.
>
> Judge Munger: You would say that if the North Western was taxed at what it should be that the M. & O. was overtaxed 15 per cent?
>
> Mr. Lamaster: Well, it was in that neighborhood. The State Board took that into consideration this year and reduced the M. & O. 9.53 per cent as against 1921, so that the difference is not so much now, but still even yet as compared with the North Western the M. & O. is still paying a slightly larger proportion of taxes, I should say. The North Western figures, of course, show, as we contend, that their value is at least 75 per cent."

2. *Systematic Undervaluation of Other Real Estate.*

A large amount of evidence was offered by the carriers to show the undervaluation of farm lands in Nebraska. This evidence consisted of records of land sales, valuation of Nebraska lands as given in the 1920 U. S. Census Reports, mortgage loans and other records embodied in the affidavit of T. A. Polleys, tax commissioner of the North Western Company. (Rec., 62-73.)

This evidence established that the assessed value of farm lands in Nebraska for 1922 did not exceed sixty per cent of the true value thereof.

As appears from the record, a similar suit to this is pending in the federal court of Nebraska between the same parties, in which the defendants therein (appellees here) filed answer wherein the following admissions were made:

> "Defendants admit that for many years farm lands in the State of Nebraska has been valued for taxation at less than its true value. In the year 1920 farm lands were valued at about 68 per cent of the true value thereof. Defendants deny specifically that for the year 1921 farm lands were assessed at 47 per cent of its true value; deny that real estate generally was assessed at 47 per cent of its true value; and allege that for the year 1921 farm land was assessed at approximately 75 per cent of its true value and that real estate generally was assessed fully as high." (Rec., 72.)
>
> "Defendants admit that while the laws of the State of Nebraska require that all property shall be assessed at its full value they allow that during the entire history of the State it has been the practice of the taxing authorities to value properties of all descriptions, including all railroads, at less than their full value; that in fixing the values of all descriptions of property for taxation it has been the practice of taxing authorities of this state to place them somewhat lower than their fair market value;

that railroads have been undervalued in fully as large proportion to their full value as have other forms of property in proportion to their full valuation." (Rec., 72.)

"That all property, both that of the plaintiff and that of all other taxpayers was assessed at less than its true value and that for the years 1920 and 1921 the property of the plaintiff was not valued to exceed 94 per cent of its true value and that while farm lands were assessed at a slightly lower proportion as compared with plaintiff's property yet in comparison with all other property the property of plaintiff was fairly and honestly valued." (Rec., 73.)

In 1920 the State Board of Equalization in its report of the assessment of lands in Nebraska stated that such assessment was upon a ratio of sixty-eight per cent of real value. (Rec., 181-186.)

In 1921 the county assessors of sixty-four Nebraska counties met and adopted a resolution recommending a reduction of fifteen per cent in the assessed value of lands below the 1920 assessment. (Rec., 186.) This resolution was copied and sent out by the State Tax Commissioner to all county assessors with the request that it be read carefully "so that the result of their labors will be in accordance with the thought of the conference." (Rec., 186.)

In the opening statement of counsel for appellees it was stated:

"that the defendants had investigated land sales in forty counties in Nebraska during the period from July 1, 1921, to July 1, 1922, which showed that

'During the whole year the ratio of the assessed valuation of lands to the sale price was about 60.95 per cent. For the period ending July, 1922, that is during the first six months of the present year, the ratio of the assessed value to the sale price was 65.40 per cent.'

In said opening statement counsel for defendants further stated:

'We have affidavits with reference to values from about 60 persons. They were secured through the offices of the county attorneys of the counties all over the state. They represent about—I have forgotten the exact number—about 20 counties, and they show that the ratio of assessed value to the fair market value is 74.28 per cent, that is, those affidavit figures averaged show about 74.28 per cent.'

Counsel for defendants further stated:

'Now, our contention will be, your Honors, that with this basis of somewhere from 60 to 75 per cent of the actual value being the assessed value—we do not contend of course, that the assessed value is the actual value, that would be an absurdity to make that contention for any class of property, railroads included. There never has been in Nebraska an absolutely cash value of any species of property. With the value put upon the property of over 60 to 75 per cent, and as the year goes on it is an increasingly larger amount owing to the gradual decrease in the value of farm lands, that is as large a proportion, and a larger proportion than the Burlington was assessed; it is as much as the North Western, it is not so large as the M. & O.'

The following colloquy occurred:

'Mr. Dressler: In view of your statement would you be willing to stipulate and save a lot of proof that the ratio of assessment of lands to the true value was somewhere between 60 and 70 per cent?

Mr. Lamaster: No, I should not. I don't think it is 70 per cent. I said from 65 to 75 and a fraction per cent.'" (Rec., 47-48.)

Again, at the conclusion of the trial and during the progress of the argument, the following colloquy occurred:

"Judge Lewis: Well, now, you might give us briefly your notions on the facts, Mr. Lamaster. Now what you claim about the facts in the railroad case is that farm lands were assessed at 61 to 75 per cent?

Mr. Lamaster: We think if due consideration were given to all of the facts and I can take up the bill of exceptions, that contains a large list of transfers, that transfers as recorded even now are filled

with transactions and affected by transactions of years ago, it would bring up the assessment to 75 per cent." (Rec., 309.)

We have not attempted to review all the evidence or to go much into detail as to that to which we have referred. We have presented only so much as we consider sufficient to show the general character of the evidence before the trial court establishing the overvaluation of appellant's property and the systematic and intentional undervaluation of other lands in Nebraska.

Specifications of Error.

I.

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA OMAHA DIVISION ERRED IN DENYING APPELLANT'S APPLICATION FOR A TEMPORARY INJUNCTION IN THIS CAUSE.

II.

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA OMAHA DIVISION ERRED IN ITS DECISION EMBODIED IN ITS ORDER DATED JANUARY 10, 1923, THAT APPELLANT HAD AN ADEQUATE REMEDY AT LAW AS THEREIN RECITED.

BRIEF OF ARGUMENT.

I.

THE UNITED STATES DISTRICT COURT HAD JURISDICTION TO ENJOIN COLLECTION OF THESE TAXES.

1. Because there was the requisite diversity of citizenship and the amount in controversy exceeded $3,000, exclusive of interest and costs. (Sec. 24, Judicial Code.)

2. Because the overvaluation of appellant's property, and the systematic, arbitrary and intentional undervaluation of other property were in violation of the rights guaranteed to appellant under the Fourteenth Amendment to the Constitution of the United States.

Cummings v. *National Bank*, 101 U. S. 153.
Greene v. *L. & I. R. Co.* 244 U. S. 499.
L. & N. R. Co. v. *Greene*, 244 U. S. 522.
Ill. Cent. R. Co. v. *Greene*, 244 U. S. 555.
Raymond v. *Chicago Union Traction Co.* 207 U. S. 20.
Sunday Lake Iron Co. v. *Wakefield Tp.* 247 U. S. 350.
Taylor v. *L. & N. R. Co.* 88 Fed. 350 (C. C. A.).
Taylor v. *L. & N. R. Co.* (certiorari denied), 172 U. S. 647.
L. & N. R. Co. v. *Bosworth*, 209 Fed. 380.
Washington Water Power Co. v. *Kootenai Co.* 270 Fed. 369 (C. C. A.).
A. T. & S. F. R. Co. v. *Sullivan*, 173 Fed. 456 (C. C. A.).
R. & T. Co. v. *Board of Equalization of Tenn.* 85 Fed. 302.

Board of Dir. of Miller Levee Dis. v. *Prairie Pipe Line Co.* (C. C. A. 8th Ct. Aug. 27, 1923). (Not yet reported.)

Sioux City Bridge Co. v. *Dakota Co.* 43 Sup. Ct. Rep. 190.

3. Because appellant would suffer irreparable injury by the levy of numerous distress warrants by the various county treasurers and its employees would be subjected to penalties for failure to pay its taxes.

Compiled Statutes of Nebraska, 1922, Sections 5822, 5823, 5840, 6010 and 6017.

II.

SECTION 5901 COMPILED STATUTES NEBRASKA 1922 PROVIDING FOR ERROR PROCEEDINGS TO THE SUPREME COURT FROM THE ACTION OF THE STATE BOARD OF EQUALIZATION AND ASSESSMENT HAS NEVER BEEN CONSTRUED BY THE NEBRASKA SUPREME COURT AND THE REMEDY IS NOT THEREFORE PLAIN OR UNDERSTOOD.

Atlantic Coast Line Ry. v. *Daughton et al.* (U. S. Sup. Ct.) 67 L. Ed. 681.

Dawson v. *Kentucky Distilleries,* 255 U. S. 288, 296.

Wallace v. *Hines,* 253 U. S. 66, 68.

Shaffer v. *Carter,* 252 U. S. 37, 47.

Union Pacific Ry. Co. v. *Weld County,* 247 U. S. 282.

Davis v. *Wakelee,* 156 U. S. 680, 688.

III.

THE ONLY SUBSTANTIAL EFFECT OF SECTION 5901 IS TO TRANSFER THE RIGHT TO PROCEED BY ERROR PROCEEDING FROM THE STATE DISTRICT COURT TO THE SUPREME COURT.

State ex rel. v. *State Board of Equalization and Assessment,* 81 Neb. 139; 115 N. W. 789.

IV.

THE NEBRASKA SUPREME COURT HAS HELD THAT:

(a) THE SCOPE OF THE REVIEW OF ORDERS FROM THE STATE BOARD OF EQUALIZATION AND ASSESSMENT IS VERY LIMITED.

State v. *Savage,* 65 Neb. 714; 91 N. W. 716.
State v. *State Board of Equalization and Assessment,* 81 Neb. 139, 147; 115 N. W. 789.
State v. *Morehead,* 101 Neb. 43; 161 N. W. 1040.

(b) THE SUPREME COURT WILL NOT REVIEW THE ASSESSMENT MADE BY THE BOARD, AND RAISE OR LOWER IT AS EQUITY AND GOOD CONSCIENCE SEEM TO REQUIRE, BUT WILL ONLY INQUIRE WHETHER THE BOARD PROCEEDED IN A LEGAL MANNER.

State v. *Savage,* 65 Neb. 714; 91 N. W. 716.

(c) THE JURISDICTION OF THE SUPREME COURT IN ERROR PROCEEDINGS EXTENDS ONLY TO THE AFFIRMANCE OR THE REVERSAL, VACATING OR MODIFYING OF A JUDGMENT ACCORDING TO THE RECORD MADE IN THE LOWER TRIBUNAL. ORIGINAL EVIDENCE BY AFFIDAVIT OR OTHERWISE CANNOT BE RECEIVED TO ALTER, CONTRADICT OR AVOID THAT RECORD.

McDonald v. *Bowman,* 40 Neb. 269; 58 N. W. 704.

(d) IT WILL BE PRESUMED PROCEEDINGS OF LOWER TRIBUNAL ARE CORRECT, AND ERROR MUST AFFIRMATIVELY APPEAR ON THE FACE OF THE RECORD.

Bedford v. *Ruby*, 17 Neb. 97, 98; 22 N. W. 76.
Weeks v. *Wheeler*, 41 Neb. 200; 59 N. W. 554.
Parody v. *School District*, 15 Neb. 514; 19 N. W. 633.
Weir v. *B. & M. R. R.* 19 Neb. 212; 26 N. W. 627.
Ashpole v. *Hallgren*, 60 Neb. 196; 82 N. W. 623.
Andrews v. *Kerr*, 54 Neb. 618; 74 N. W. 1071.

(e) WHERE THE EVIDENCE IS NOT PRESERVED AND A TRANSCRIPT OF THE PROCEEDINGS IS NOT PRESENTED, IT WILL BE CONCLUSIVELY PRESUMED IN THE APPELLATE COURT THAT THE FINDINGS OF FACT OF THE LOWER TRIBUNAL ARE TRUE.

Shelby v. *Creighton*, 2 Neb. Unof. 267.
Hoy v. *State*, 69 Neb. 516; 96 N. W. 228.
Lambert v. *Stevens*, 29 Neb. 283; 45 N. W. 557.
Falstrom v. *Banning*, 64 Neb. 339; 89 N. W. 1133.
Aspinwall v. *Sabin*, 22 Neb. 73; 34 N. W. 72.

(f) THE ASSESSMENT AND LEVY AND COLLECTION OF TAXES ARE NOT EQUITABLE PROCEEDINGS. THEY MUST NECESSARILY BE GOVERNED BY RULES WHICH IN MANY RESPECTS MAY BE CONSIDERED ARBITRARY. THE TAXING POWERS AND THE TAXPAYERS MUST COMPLY WITH THESE RULES.

Darr v. *Dawson County*, 93 Neb. 93; 139 N. W. 852.

(g) THE STATE BOARD OE EQUALIZATION AND ASSESSMENT IN VALUING RAILROAD PROPERTY AND EQUALIZING SAME ACT IN A QUASI JUDICIAL CAPACITY, AND THE ORDERS FIXING THE VALUATION IS A FINAL ORDER.

State ex rel. v. *State Board of Equalization and Assessment*, 81 Neb. 139; 115 N. W. 789.
State v. *Savage*, 65 Neb. 714; 91 N. W. 716.

(h) ON ERROR PROCEEDINGS FROM THE ACTION OF A CITY COUNCIL LEVYING A SPECIAL ASSESSMENT FOR BENEFITS ON ACCOUNT OF PAVING, WHERE THE BOARD REFUSED TO DISCLOSE THE EVIDENCE UPON WHICH THEY PROPOSED TO BASE THE ASSESSMENT, AND THE ONLY EVIDENCE IN THE BILL OF EXCEPTIONS WAS OFFERED BY THE RAILWAY COMPANY "THE BOARD MUST BE CONSIDERED TO HAVE ACTED AS APPRAISERS OF THE BENEFIT, ACTING UPON INFORMATION AND UPON THEIR KNOWLEDGE OF THE PROPERTY, AND THE FACT ALONE THAT THE RECORD DOES NOT SET FORTH THE EVIDENCE UPON WHICH THE BOARD ACTED WILL NOT RENDER THE ASSESSMENT ERRONEOUS."

C. & N. W. Ry. Co. v. *City of Albion*, 192 N. W. 233 (Neb.).

V.

SECTION 5842 COMPILED STATUTES NEBRASKA 1922 AUTHORIZES THE BOARD TO SEEK AND ACT UPON ANY INFORMATION IT MAY OBTAIN FROM WHATEVER SOURCE, AND, THE NEBRASKA SUPREME COURT, UNDER THE RULE OF C. & N. W. RY. V. CITY OF ALBION (SUPRA), WOULD HOLD THAT THE BOARD IS NOT OBLIGED TO DISCLOSE SUCH INFORMATION NOR EMBODY IT IN A BILL OF EXCEPTIONS FOR REVIEW BY ERROR PROCEEDINGS, AND THERE IS NO WAY WHEREBY APPELLANT COULD CAUSE ALL THE FACTS, WHICH THE BOARD CONSIDERED, TO BE EMBRACED IN A BILL OF EXCEPTIONS FOR REVIEW.

Section 5842 is as follows:

> "The returns of railroad companies or corporations shall not be held to be conclusive as to the value of the property, but the State Board of Equalization and Assessment shall, from all the information which it is able to obtain, including records of the Railway Commission or other regulatory body, find the true value of all such property, including tangible property and franchises, and shall assess the same on the same basis as other property is hereby required to be assessed. The valuation of each mile shall be determined by dividing the whole value by the number of miles of the main track of each road or line."

See, also:

C. B. & Q. R. R. Co. v. *Babcock*, 204 U. S. 585.

VI.

SECTION 5901 COMPILED STATUTES NEBRASKA 1922 DOES NOT CONTEMPLATE THAT RAILROADS SHALL HAVE ANY HEARING BEFORE THE BOARD. NO NOTICE TO RAILROADS IS REQUIRED, NO OPPORTUNITY TO PRESENT EVIDENCE IS PROVIDED FOR, AND IT IS ONLY BY GRACE OF THE BOARD THAT RAILROADS WOULD HAVE OPPORTUNITY TO OFFER EVIDENCE OF ANY KIND TO BE PRESERVED BY BILL OF EXCEPTIONS FOR ERROR PROCEEDINGS.

(Section 5901 quoted on page 6 of this brief.)

VII.

WHERE, AS IN NEBRASKA, THE ORDER OF THE STATE BOARD OF EQUALIZATION AND ASSESSMENT FIXING RAILROAD VALUATIONS FOR TAXATION IS HELD BY THE HIGHEST COURT OF THE STATE TO BE A FINAL ORDER, AND THE STATUTE AFFORDS NO FURTHER PROCEDURE FOR INQUIRING INTO THE AMOUNT OF THE VALUATION, THE VALIDITY OF THE ASSESSMENT MAY BE LITIGATED IN THE FEDERAL DISTRICT COURT OF EQUITY, THERE BEING THE REQUISITE DIVERSITY OF CITIZENSHIP AND JURISDICTIONAL AMOUNT INVOLVED.

Smyth v. *Ames*, 169 U. S. 466.

Western Union Telegraph Co. v. *Trapp*, 186 Fed. 114 (C. C. A.).

Bacon v. *Rutland R. R. Co.* 232 U. S. 134.

Prentis v. *Atlantic Coast Line Co.* 211 U. S. 210.

City Railway Co. v. *Beard*, 283 Fed. 313.

Prendergast v. *New York Telephone Co.* (U. S. Sup. Ct.), 67 Law Ed. 516.

VIII.

THE ADEQUATE REMEDY AT LAW REFERRED TO IN SECTION 267 JUDICIAL CODE AS DEPRIVING A FEDERAL COURT OF EQUITY OF JURISDICTION, MUST BE A REMEDY WHICH IS AVAILABLE IN THE FEDERAL COURT. IT IS NOT ENOUGH THAT A REMEDY AT LAW MAY EXIST IN THE STATE COURT.

Smyth v. *Ames*, 169 U. S. 466, 516.

St. Louis S. F. R. R. Co. v. *McElvain*, 253 Fed. 123.

Franklin v. *Nevada California Power Co.* 264 Fed. 643 (C. C. A. 9th Ct.).

C. & N. W. Ry. Co. v. *Railroad & Warehouse Commission of Minnesota*, 280 Fed. 387.

Coler v. *Stanley County*, 89 Fed. 257.

United States Iife Insurance Co. v. *Cable*, 98 Fed. 761-765 (C. C. A.).

Scott v. *Neely*, 140 U. S. 106.

Brun v. *Mann*, 151 Fed. 153; 12 L. R. A. n. s. 154 (C. C. A.).

McConihay v. *Wright*, 121 U. S. 201.

National Surety Co. v. *State Bank*, 120 Fed. 593 (C. C. A. 8th Ct.).

IX.

APPELLANT HAD NO ADEQUATE REMEDY AT LAW IN THIS CASE, EVEN IF WE CONCEDE, FOR THE PURPOSES OF ARGUMENT, THAT ON ERROR PROCEEDINGS TO THE STATE SUPREME COURT A FULL SHOWING MIGHT HAVE BEEN POSSIBLE TO SHOW THE INEQUALITY OF THE ASSESSMENT, BECAUSE, UNDER REPEATED HOLDINGS OF THAT COURT, THE ONLY REMEDY AFFORDED WOULD HAVE BEEN THE DIRECTION TO APPELLANT TO APPLY TO THE VARIOUS COUNTY ASSESSING AUTHORITIES IN THIRTY-SEVEN DIFFERENT COUNTIES TO HAVE THE ASSESSMENT OF ALL OTHER PAXPAYERS RAISED UP TO THE LEVEL OF APPELLANT'S ASSESSMENT; BUT THE STATE SUPREME COURT COULD NOT HAVE REDUCED THE ASSESSMENT.

Lincoln Telephone Co. v. *Johnson County*, 102 Neb. 254; 166 N. W. 627.

Sioux City Bridge Co. v. *Dakota County*, 105 Neb. 843; 182 N. W. 485.

X.

THIS COURT HAS CONDEMNED SUCH REMEDY AS NO REMEDY AT ALL.

Sioux City Bridge Co. v. *Dakota County*, 43 Sup. Ct. Rep. 190, and cases there cited.

67 Law Ed. 220.

ARGUMENT.

I.

THE UNITED STATES DISTRICT COURT HAD JURISDICTION TO ENJOIN COLLECTION OF THESE TAXES.

1. The requisites of diversity of citizenship and jurisdictional amount in controversy being present, the jurisdiction of the District Court is clear. (Sec. 24 Judicial Code.)

2. A federal question was clearly presented, in fact, the very gravamen of the action is the illegal actions of appellees resulting in the taking of appellant's property without due process of law and the denial to it of the equal protection of the laws. (14th Amendment, U. S. Const.)

This court is not now concerned with the ultimate question of whether or not an injunction, temporary or permanent, shall be granted. It is, we take it, concerned with the question of whether the bill and the evidence presented an issue giving rise to a federal question, bringing into operation the equity jurisdiction of the District Court.

That such federal question was presented, and that the evidence justified, if it did not require, the exercise of the trial court's equity powers by enjoining the collection of these taxes, results from the allegations of the bill and the evidence as briefly set forth in the statement of the case.

The bill charged that the taxes levied against appellant were illegal because its property had been valued for taxing purposes at more than its true value, while the property of all other taxpayers, and particularly

real estate, had systematically, intentionally and continuously been valued at only a fraction of its true value. (Rec., 4.) This allegation of the bill was abundantly established by the evidence.

As appears from the statement of the case, the value of the North Western Company property did not exceed $32,088,874, or $29,129 per mile, while the assessment made by the State Board of Equalization and certified to the various counties was $38,714,373, or $36,475 per mile, resulting in an assessment approximately twenty per cent in excess of its full value.

Likewise, the evidence disclosed an under-valuation of other lands so general and uniform throughout the state, at about sixty per cent of true values, as to preclude the possibility of honest errors of judgment in the assessing officers. So conclusive was this proof that it led counsel for appellees to concede that farm lands had been assessed at from sixty per cent to seventy-five per cent of their true values. (Rec., 47.) When this proof was supplemented by affirmative evidence that the State Board of Equalization acknowledged by its written report (Rec., 181-186) that the assessments in 1920 were sixty-eight per cent of true values, and in 1921 the assessors by resolution reduced the 1920 assessments by fifteen per cent (Rec., 186) (there being no new assessment of lands in 1922) there was no escape from the conclusion that this systematic under-valuation of farm lands was intentional and deliberate.

Section 1, Article VIII, of the Constitution of Nebraska provides:

> "The necessary revenue of the state and its governmental subdivisions shall be raised by taxation in such manner as the legislature may direct; but taxes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises, and taxes uniform as to class may be

levied by valuation upon all other property. Taxes, other than property taxes, may be authorized by law. Existing revenue laws shall continue in effect until changed by the legislature. (Amended, 1914, 1920.)" (Rec., 4.)

It is further provided by Section 4, Article VIII, of the Constitution of Nebraska:

"The legislature shall have no power to release or discharge any county, city, township, town or district whatever, or the inhabitants thereof, or any corporation, or the property therein, from their or its proportionate share of taxes to be levied for state purposes, or due any municipal corporation, nor shall commutation for such taxes be authorized in any form whatever."

Section 5820, Compiled Statutes of Nebraska, 1922, provides:

"All property in this state, not expressly exempt therefrom, shall be subject to taxation, and shall be valued and assessed at its actual value. 'Actual value,' as used in this act, shall mean its value in the market in the ordinary course of trade." (Rec., 5.)

Such a state of facts brings the case squarely within the rule of the cases heretofore cited under this heading, that equity will enjoin the collection of taxes based upon assessments which are intentionally and systematically discriminatory, where irreparable injury to the complaining taxpayer will result.

This rule is thus stated in *Sunday Lake Iron Co.* v. *Wakefield Tp.* 247 U. S. 350:

"The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents. And it must be regarded as settled that intentional systematic undervaluation by state officials of other

taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property. *Raymond* v. *Chicago Union Traction Company*, 207 U. S. 20, 35, 37."

This rule was most recently applied by this court in the case of *Sioux City Bridge Company* v. *Dakota County*, 43 Sup. Ct. Rep. 190, in which a Nebraska tax was involved, and wherein the same discriminatory system of assessments was presented. The court there said:

"The dilemma presented by a case where one or a few of a class of taxpayers are assessed at 100 per cent of the value of their property in accord with a constitutional or statutory requirement, and the rest of the class are intentionally assessed at a much lower percentage in violation of the law, has been often dealt with by courts and there has been a conflict of view as to what should be done. There is no doubt, however, of the view taken of such cases by the federal courts in the enforcement of the uniformity clauses of state statutes and constitutions and of the equal protection clause of the Fourteenth Amendment. The exact question was considered at length by the Circuit Court of Appeals of the Sixth Circuit in the case of *Taylor* v. *Louisville & N. R. Co.* 88 Fed. 350, 364, 365, 31 C. C. A. 537, and the language of that court was approved and incorporated in the decision of this court in *Greene* v. *Louisville & Interurban R. Co.* 244 U. S. 499, 516, 517, 518, 37 Sup. Ct. 673, 61 L. Ed. 1280. The conclusion in these and other federal authorities is that such a result as that reached by the Supreme Court of Nebraska is to deny the injured taxpayer any remedy at all because it is utterly impossible for him by any judicial proceeding to secure an increase in the assessment of the great mass of under assessed property in the taxing district. This court holds that the right of the taxpayer whose property alone is taxed at 100 per cent of its true value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the require-

ment of statute. The conclusion is based on the principle that where it is impossible to secure both the standard of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law. In substance and effect the decision of the Nebraska Supreme Court in this case upholds the violation of the Fourteenth Amendment to the injury of the Bridge Company. We must, therefore, reverse its judgment."

We deem it unnecessary to quote from the other cases we have cited. The rule is so well established as to be beyond the field of argument. No controversy with appellees is anticipated upon this feature of the case. Enough has been said to disclose the clear applicability of the rule to the record before us.

3. The bill alleges:

"Plaintiff further alleges and charges that said unlawful taxes constitute a lien against plaintiff's property and a cloud upon plaintiff's title to said property, that the lien of said taxes against plaintiff's property will unlawfully burden plaintiff in its ability to finance its business as a common carrier of interstate commerce, and cripple, injure, and impair the plaintiff in the operation of its line of railroad as a common carrier of interstate commerce. And plaintiff further alleges that the defendant county treasurers, and each of them, will issue numerous distress warrants against the plaintiff and against its property and will cause to be instituted large numbers of suits against the plaintiff for the collection of said unlawful and discriminatory taxes unless restrained from so doing by order of this court."

Section 5822 of the Nebraska Statutes provides:

"Taxes on all real property shall be a first lien thereon from and including the first day of December of the year in which they are levied until the same are paid, except general city taxes on real property within the corporate limits of cities of the metropolitan class, which shall be a first lien there-

on from and including the first day of May following the levy, until the same are paid."

Section 5823 of the Nebraska Statutes provides:

"Taxes assessed upon personal property shall be a first lien upon the personal property of the person to whom assessed from and after the first day of November of the year in which they are assessed, until paid."

Section 5840 of the Nebraska Statutes provides:

"The board on the first Monday of May of each year shall proceed to ascertain all property of any railroad company owning, operating or controlling any railroad or railroad service in this state, which for the purpose of assessment and taxation, shall be held to include the main track, sidetrack, spur tracks, warehouse tracks, roadbed, right of way and depot grounds, and all water and fuel stations, buildings and superstructures thereon, and all machinery, rolling stock, telegraph lines and instruments connected therewith, all material on hand and supplies provided for operating and carrying on the business of such road, in whole or in part, together with franchises and all other property of such railroad company used or held for the purpose of operating its road, and appraise and assess the same as personal property as herein provided."

Section 6010 of the Nebraska Statutes provides:

"The county treasurer is hereby required, during the month of December of each year after the personal taxes for the year have become delinquent, to notify by mail all persons of the amount of their delinquent personal tax, and that unless the same is paid by February first next following, distress warrant will be issued therefor. The treasurer shall, on and after the first day of February next after the personal taxes for the last preceding year have become delinquent, collect the same, together with interest and costs of collection, by distress and sale of personal property belonging to the person against whom levied in the manner provided by law for the levy and sale of personal property on execution. Distress warrants shall be issued against all per-

sons having delinquent personal tax for each year, and each such warrant shall include all delinquent personal taxes of the person against whom issued, unless such person shall, on or before February 1st, file with the treasurer an affidavit that he is unable, by reason of poverty, to pay any such tax, in which case distress warrants shall not issue until ordered by the county board."

Section 6017 of the Nebraska Statutes provides:

"When any corporation doing business in this state shall fail or neglect to pay any tax assessed or charged against it, when the same shall have become delinquent, the county treasurer shall notify any agent or officer of the company in the county where such tax is delinquent that the same is delinquent, and the amount due, and shall further notify the officer or agent to pay over all moneys that may be in his hands, or that may afterwards come into his hands, belonging to such corporation, not exceeding the amount of tax due, to such county treasurer; and if such agent or officer shall fail to pay over the money to the county treasurer, he shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than fifty dollars, nor more than five hundred dollars."

It thus appears that the assessments of appellant's property become first liens upon its property in the various counties in which the same is located. Railroad property under Section 5840 is declared to be personal property and collection of such tax would be made under Section 6010 by the issuance of distress warrants against its property. Appellant's railroad extends into thirty-seven counties in Nebraska and the bill charges, and it is not disputed, that unless enjoined the various county treasurers who are parties defendant in the case would issue distress warrants against its property and would cause to be instituted numerous suits against it for the collection of said taxes.

Under Section 6017, Nebraska Statutes, appellant's

various agents in the thirty-seven counties would be subjected to penalties of from $50 to $500 for failure to comply with the demand of the county treasurers for payment of appellant's taxes in such counties.

Thus is satisfied the rule of equity that injunction will issue to restrain the collection of illegal taxes where irreparable injury will be sustained or where a multiplicity of actions will be maintained.

II.

SECTION 5901 COMPILED STATUTES NEBRASKA, 1922, PROVIDING FOR PROCEEDINGS TO THE SUPREME COURT FROM THE ACTION OF THE STATE BOARD OF EQUALIZATION AND ASSESSMENT HAS NEVER BEEN CONSTRUED BY THE NEBRASKA SUPREME COURT AND THE REMEDY IS NOT THEREFORE PLAIN OR UNDERSTOOD.

This court has many times held that where the remedy at law, which it is claimed deprives a court of equity of jurisdiction, depends upon a state statute which has not been construed or applied by the highest court of the state, it is not such a plain and understood remedy as will deprive an equity court of jurisdiction.

In *Atlantic Coastline Railway* v. *Daughton* (U. S. Ct. Rep.), 67 Law Ed. 681, it is said:

> "The Supreme Court of the United States cannot say that the remedy at law for illegal taxation by a state is plain and adequate, so as to prevent maintenance of a bill to enjoin its enforcement, where the remedy depends on a statute which has not been construed and applied by the highest court of the state."

In *Dawson* v. *Kentucky Distilleries & Warehouse Co.* 255 U. S. 288, this court said:

> "To pay under protest and sue to recover is not such an adequate legal remedy against an illegal

state tax as will prevent the Federal Courts from exercising their equitable jurisdiction to restrain enforcement if the right to recover back is uncertain under the state law when the injunction suit is begun."

In *Wallace* v. *Hines*, 253 U. S. 66, which involved a tax law of North Dakota, this court said:

"As the tax is made a first lien upon all the property of the plaintiff railroads in the state and thus puts a cloud upon their title, and as delay in payment is visited with considerable penalties, there is jurisdiction in equity unless there is an adequate remedy at law against the state, to which the tax is to be paid. The only ground for supposing that there is such a remedy is a provision that, 'An action respecting the title to property, or arising upon contracts may be brought in the District Court against the state the same as against a private person.' This case does not arise upon contract except in the purely artificial sense that some claims for money alleged to have been obtained wrongfully might have been enforced at common law by an action of assumpsit. Nothing could be more remote from an actual contract than the wrongful extortion of money by threats, and we ought not to leave the plaintiff to a speculation upon what the state court might say if an action at law were brought."

In *Union Pacific R. R. Co.* v. *Weld County*, 247 U. S. 282, a statute of Colorado provided that suit to recover taxes illegally collected might be maintained against the Board of County Commissioners, but an amendment to this statute rendered this right rather uncertain.

This Court said:

"Equity has jurisdiction to enjoin the collection of illegally discriminatory taxes, where the existence of an adequate and complete remedy at law is doubtful, where the legal remedy by paying the taxes and suing to recover back necessitates separate actions against several school districts and will not displace the equitable remedy by injunction in one

suit. Section 5750 Colorado Rev. Stat. 1908 provided a plain adequate and complete remedy in cases of illegal taxes by requiring the Board of County Commissioners to refund them when paid and by conferring impliedly on the taxpayer a right to recover them though levied for State, School Districts and Town, as well as for county, purposes by one action against the board. But, in view of later provisions of laws 1913 Chapter B 134 Section 5, the effect of which has not been determined by the State Supreme Court and which might be construed as prohibiting the board from refunding without the approval of the State Tax Commission and as withdrawing the right of action against the board where the Commission disapproves, held, that the existence of an adequate legal remedy is so uncertain and debatable that jurisdiction in a suit for an injunction could not properly be declined."

Section 5901 must be read in connection with the general statutes of the state relating to error proceedings. These are (*Section* 9127, Compiled Statutes Nebraska 1922):

> "A judgment rendered, or final order made, by a county court, justice of the peace, or any other tribunal, board or officer exercising judicial functions, and inferior in jurisdiction to the district court, may be reversed, vacated or modified by the district court."

Section 9128:

> "An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, is a final order which may be vacated, modified or reversed, as provided in this chapter and chapter 19."

Section 9129:

> "The proceedings to obtain such reversal, vacation or modification, shall be by petition entitled "Petition in Error," filed in a court having power

to make such reversal, vacation or modification, setting forth the errors complained of, and thereupon a summons shall issue and be served or publication made, as in the commencement of an action. A service on the attorney of record in the original case shall be sufficient. The summons shall notify the adverse party that a petition in error has been filed in a certain case, naming it, and shall be returnable on or before the first day of the next term of court if issued in vacation, and twenty days before the commencement of the term; if issued in term time, or within twenty days before the commencement of the term, it shall be returnable on a day named in said summons. In all cases in the Supreme Court, if a case be docketed twenty days or more before the next succeeding term it shall stand for hearing at said term. If less than twenty days intervene, the cause shall not stand for trial, except by consent of all the parties thereto, until the second term after the docketing of said cause, except causes brought before the court in the exercise of its original jurisdiction."

Section 9130 provides for the service of the summons in error.

Section 9131 provides:

"The plaintiff in error shall file with his petition a transcript of the proceedings containing the final judgment or orders sought to be reversed, vacated or modified. No written or printed abstract or any copy of an abstract of the record shall be required in any case in the Supreme Court of this State."

Section 9132:

"Judges of county courts, justices of the peace and other judicial tribunals having no clerk, and clerks of every court of record, shall, upon request and being paid the lawful fee therefor, furnish an authenticated transcript of the proceedings, containing the judgment or final orders of said courts, to either of the parties to the same, or to any person interested in procuring such transcript."

Sections 9133, '34, '35, and '36 specify the supersedeas

undertaking to be given and by whom to be approved and the procedure to be had upon affirmance or reversal of the judgment by the district court.

We have set forth the provisions of the Nebraska Statutes relative to error proceedings to the District Court because the State Supreme Court has held that under these sections error proceedings would lie from the order of the State Board of Equalization and Assessment to the District Court of Lancaster County; that being the County in which the State Capitol is located and the County where the State Board of Equalization holds its meetings.

III.

THE ONLY SUBSTANTIAL EFFECT OF SECTION 5901 IS TO TRANSFER THE RIGHT TO PROCEED BY ERROR PROCEEDINGS FROM THE STATE DISTRICT COURT TO THE SUPREME COURT.

The Supreme Court of the State held in *State ex rel.* v. *State Board of Equalization and Assessment*, 81 Neb. 139; 115 N. W. 789:

> "The State Board of Equalization and Assessment, in valuing and assessing property for taxation, acts in a quasi judicial capacity, and its action is not subject to collateral attack, except on grounds of fraud or other wrongful conduct equivalent thereto, or for the exercise of power not conferred upon it by law.
>
> The action of such board is in its nature a final order, which may be reviewed in the district court by a petition in error."

Thus it will be seen that under the general error proceedings statutes there was a right to proceed to the District Court of Lancaster County by petition in error from an order of the State Board of Equalization and Assessment. Whether or not that affords to the Peti-

tioner any remedy will be discussed hereafter. But it is apparent that the legislature, in providing by *Section* 5901 that error proceedings might be prosecuted to the Supreme Court of the State, has accomplished nothing more than to transfer the right to proceed by petition in error from the District Court to the Supreme Court of the State. If Appellants had no adequate remedy by petition in error to the District Court they have no greater remedy by petition in error to the Supreme Court under Section 5901.

IV.

THE NEBRASKA SUPREME COURT HAS HELD THAT:

(a) THE SCOPE OF THE REVIEW OF ORDERS OF THE STATE BOARD OF EQUALIZATION AND ASSESSMENT IS VERY LIMITED.

In *State* v. *Savage*, 65 Neb. 714, 91 N. W. 716, attempt was made to mandamus the board to consider evidence in addition to what they claimed to have considered in arriving at the value of certain property for taxation purposes. The Court said Page 769:

> "We can only inquire into the matter for the purpose of determining whether respondents, in assessing the property which it was their duty to assess, have expressed an honest judgment as to assessable values, upon sufficient information, or whether the method pursued in ascertaining and fixing the value of the property assessed was in such wanton and reckless disregard of their duties as to warrant the conclusion that they acted fraudulently. It is not within the province of this Court to review the assessment made by the board, and to raise or lower it as equity and good conscience might seem to require. We can only determine whether the board has proceeded in a legal manner and, if so, we can not direct further action, even though we may disagree with the conclusion reached, or regard the

method of procedure as not the most appropriate and best calculated to secure with the greatest certainty and accuracy a true valuation of the property assessed. If they have acted by assessing all the property it is their duty under the law to assess, and have proceeded in such manner that it cannot be said they have acted fraudulently in that which they have done, the court is powerless to correct the error, even though it be conceded that the assessment as made is lower than in justice it should have been."

In *State* v. *State Board of Equalization and Assessment*, 81 Neb. 139, 115 N. W. 789, which was a mandamus proceeding to compel the State Board to convene and make and record special findings in the valuation and assessment of certain property and to allow exceptions thereto, which application was denied, the court says, page 146, 147:

"There is no provision of the statutes requiring the respondent board to keep a record of its interlocutory rulings or the reasons therefor during the progress of a hearing upon the valuation of the property of railroad corporations for the purpose of taxation. While the orderly transaction of its business may prompt the board to keep such a record of its rulings upon such matters for its own convenience, yet it is not an essential requirement for the proper performance of its duties. There is no doubt that all the steps required by the Statute in making an assessment should be preserved as a matter of record, in order to evidence and perpetuate the fact that the board has acted within its jurisdiction; but, as above stated, such record need not contain its rulings upon interlocutory questions, and when it records the matters necessary to confer upon it the power to act, its general proceedings, and the final result of its deliberations fixing the value of properties, it has performed all that the law contemplates in that behalf.

* * * As clearly pointed out in *State* v. *Savage*, *supra*, the field of review of the action of the taxing board is only a narrow one at best, and this renders

it the more essential that due regard be paid to the rights of the taxpayer during its proceedings."

In *State* v. *Morehead*, 101 Neb. 37 (161 N. W. 1040), at page 43 it is said:

"The action of the State Board of Equalization may be reviewed in the District Court by a petition in error. *State* v. *State Board of Equalization and Assessment*, 81 Neb. 139."

But this holding of the State Supreme Court, that the orders of the board may be reviewed by petition in error to the district court, was by way of denying relief by writ of mandamus. So far as we know there has never been any proceeding from the State Board of Equalization by petition in error either to the District Court or to the Supreme Court.

(b) THE SUPREME COURT OF NEBRASKA HAS ALSO HELD THAT IT WILL NOT REVIEW THE ASSESSMENT MADE BY THE BOARD, AND RAISE OR LOWER IT AS EQUITY AND GOOD CONSCIENCE SEEM TO REQUIRE, BUT WILL ONLY INQUIRE WHETHER THE BOARD PROCEEDED IN A LEGAL MANNER.

This was the holding of the Court in *State* v. *Savage*, 65 Neb. 714, 91 N. W. 716, *supra*, and is a clear and unmistakable warning to appellants that, when the only remedy which will do them any good is equitable relief from the inequitable misconduct of the State Board of Equalization and Assessment occasioned by over-assessing appellants and under-assessing all other classes of property, the State Supreme Court may not be expected to apply the remedy whether it is sought by mandamus, error proceedings or otherwise.

(c) THE STATE SUPREME COURT HAS ALSO HELD THAT ITS JURISDICTION IN ERROR PROCEEDINGS EXTENDS ONLY TO THE AFFIRMANCE ON THE REVERSAL, VACATING OR MODIFYING OF A JUDGMENT ACCORDING TO THE RECORD MADE IN THE LOWER TRIBUNAL. ORIGINAL EVIDENCE BY AFFIDAVIT OR OTHERWISE CANNOT BE RECEIVED TO ALTER, CONTRADICT OR AVOID THAT RECORD.

This rule is announced in *McDonald* v. *Bowman*, 40 Neb. 269, (58 N. W. 704), in syllabus 1:

> "The jurisdiction of this court in error proceedings extends only to the affirmance or the reversal, vacating or modifying of a judgment according to the record made in the district court. Original evidence, by affidavit or otherwise, cannot be here received to alter, contradict or avoid that record."

This rule of the state court should be borne in mind when we come to consider what record it is possible to make before the State Board of Equalization and Assessment. If the nature of the hearing before that board is such, or, if the statutory obligations of the board do not require that all facts to be considered by the board in making up their conclusion as to the value of railroad property be spread of record so as to be available for review on error proceedings, it is at once apparent that error proceedings in such cases constitute a remedy which is very far from being either full, complete or adequate.

(d) THE STATE SUPREME COURT HAS HELD REPEATEDLY THAT IT WILL BE PRESUMED THE CONCLUSION OF THE LOWER TRIBUNAL IS CORRECT AND BEFORE IT WILL DISTURB SUCH A RESULT ERROR MUST BE MADE TO AFFIRMATIVELY APPEAR ON THE FACE OF THE RECORD.

A few illustrations of such holding will be sufficient. In *Andrews* v. *Kerr,* 54 Neb. 618, (74 N. W. 1071), syllabus 2 says:

> "To warrant a reversal, that errors have been committed and the rights of the complaining party were prejudicially affected thereby must affirmatively appear of the record."

In *Ashpole* v. *Hallgren,* 60 Neb. 196, (82 N. W. 623), it is said in syllabus 2:

> "Error in the proceedings of the District Court will not be presumed, but must be affirmatively shown."

Since under the statute error proceedings from the State Board of Equalization and Assessment could not stand on any more favorable basis than error proceedings from the District Court, these rules apply.

(e) THE STATE SUPREME COURT HAS ALSO HELD THAT WHERE THE EVIDENCE ON WHICH THE LOWER TRIBUNAL HAS ACTED IS NOT PRESERVED IN A BILL OF EXCEPTIONS AND A TRANSCRIPT OF THE PROCEEDINGS IS NOT PRESENTED IT WILL BE CONCLUSIVELY PRESUMED IN THE APPELLATE COURT THAT THE FINDINGS OF FACT OF THE LOWER TRIBUNAL ARE TRUE.

In *Hoy* v. *State,* 69 Neb. 516, (96 N. W. 228), syllabus 1 says:

> "When the evidence upon which the trial court decided an issue of fact is not preserved in the record, it will be presumed that the decision is right."

In *Falstrom* v. *Banning*, 64 Neb. 339, (89 N. W. 1133), the court says:

> "The presumptions are all in favor of the regularity of the proceedings had in the district court when a cause is brought here by appeal for review of the proceedings had in that tribunal, and such presumptions will be indulged in until from the record the contrary appears. When objections are made to an order of confirmation of sale of real estate made in judicial proceedings, and the grounds of objections do not appear in the record, it will be presumed that no valid objection was presented and the order appealed from will accordingly be affirmed."

When we consider that the State Supreme Court had held in *State* v. *State Board of Equalization and Assessment*, 81 Neb. 139, (115 N. W. 789), that the Board of Equalization is not required to make a record of the reasons for its conclusions nor to set forth in the record the evidence upon which its conclusion is based, it is very difficult to understand of what value error proceedings to the State Supreme Court would be in face of the holding of that Court that it will affirm the lower tribunal unless error affirmatively appears. If we assail the order of the State Board on the ground that it is not sustained by the evidence, but is contrary to the evidence and yet the State Board is not obliged to make such a record as will disclose the evidence upon which it acted it is obvious that the State Supreme Court would grant no relief in such a case.

(f) THE STATE SUPREME COURT HAS ALSO HELD IN *Darr* v. *Dawson County*, 93 Nebr. 93; 139 N. W. 852:

> "The assessment and levy and collection of taxes are not equitable proceedings. They must necessarily be governed by rules which in many respects may be considered arbitrary. The taxing powers and taxpayers must comply with these rules."

(g) THE STATE SUPREME COURT HAS ALSO HELD THAT THE STATE BOARD OF EQUALIZATION AND ASSESSMENT IN VALUING RAILROAD PROPERTY AND EQUALIZING SAME ACTS IN A QUASI JUDICIAL CAPACITY, AND THE ORDER FIXING THE VALUATION IS A FINAL ORDER.

In *State* v. *Savage*, 65 Neb. 714 (91 N. W. 716), at page 769 the court says:

> "It is not within the province of this court to review the assessment made by the board, and to raise or lower it as equity and good conscience might seem to require. We can only determine whether the board has proceeded in a legal manner, and, if so, we cannot direct further action, even though we may disagree with the conclusion reached, or regard the method of procedure as not the most appropriate and best calculated to secure with the greatest certainty and accuracy a true valuation of the property assessed. If they have acted by assessing all the property it is their duty under the law to assess, and have proceeded in such manner that it cannot be said they have acted fraudulently in that which they have done, the court is powerless to correct the error, even though it be conceded that the assessment as made is lower than in justice it should have been."

Of course, by the same token, where the charge made is that the valuation of railroads fixed by the Board is grossly higher than it should have been the court is equally powerless, under this decision, to correct the injustice.

At page 770 the court says:

> "The State Board of Equalization it must be admitted, is an administrative body, clothed with quasi judicial powers in regard to the assessment of property it is by law required to value and assess."

In *State* v. *State Board of Equalization and Assess-*

ment, 115 N. W. 789, 81 Neb. 139, at page 140, syllabus 2 the court said:

> "The action of such board is in its nature a final order, which may be reviewed in the district court by a petition in error."

It is important to bear in mind this rule of the state Supreme Court in testing whether or not a federal court of equity has jurisdiction to entertain this cause upon the merits. If the order of the Board of Equalization and Assessment is a final order it must necessarily be because the valuation of appellant's property for taxation purposes and the equalization thereof is a completed act when the State Board of Equalization and Assessment has entered its order. There is no longer anything to be done in order to complete the assessment process. *The issues, therefore, as to the validity of the Board's order fixing values become a justiciable issue.*

The State Supreme Court has held in *Hooper Telephone Co.* v. *Nebraska Telephone Co.,* 96 Neb. 245, 147 N. W. 674, that *the Supreme Court cannot be vested by the legislature, under the Nebraska Constitution with anything but judicial functions.* In the cited case it was contended that the provisions of the Nebraska Statutes for appeal from the orders of the State Railway Commission direct to the Supreme Court were unconstitutional as an attempt to confer legislative powers upon the Supreme Court. The court held that if such were the purpose of the law and the effect of it they would not hesitate to hold the law unconstitutional, but they held that such appeal provided only for the review of judicial issues and not otherwise and therefore they upheld the appeal statute.

At page 257 of the opinion the court says:

> "Our Constitution forbids the legislature to confer legislative powers upon the court. If the statute

providing for this appeal necessarily does so, such legislation would be void."

The court, it will be seen, has held that the State Board of Equalization and Assessment in fixing the valuation of railroads for taxation purposes acts as an administrative body. Its order fixing the value is quasi judicial and is a final order. Since the court holds that such order may be reviewed to a limited extent on error proceedings and the court also holds that it is vested with jurisdiction over nothing but judicial questions, then it is obvious that the effect of the holding is that the issue as to the validity of the Board's order is a judicial question and may therefore be litigated in any court having jurisdiction.

(h) A recent decision of the Nebraska Supreme Court in *Chicago and North Western Railway Company* v. *City of Albion*, 192 N. W. 233, is, we think, quite illuminating as to what the attitude of the State Supreme Court would be on the question of the sufficiency of the evidence to sustain the order of the Board of Equalization fixing values. The cited case involved error proceedings from a city council acting as a Board of Equalization for the levying of special assessments against the railway company's property for benefits on account of paving. The Board of Equalization in that case had presented a tentative schedule of assessments and the Board was requested to make a matter of record the evidence upon which it relied to support such proposed assessment for benefits. The Board refused to disclose any information. That fact was preserved in a bill of exceptions and presented to the District Court on error proceedings and thence to the Supreme Court by appeal and the Supreme Court held that where the Board refused to disclose the evidence on which they proposed to

base the assessment and the only evidence in the bill of exceptions was offered by the railway company:

> "The Board must be considered to have acted as appraisers of the benefits, acting upon information and upon their knowledge of the property, and the fact alone that the record does not set forth the evidence upon which the Board acted will not render the assessment erroneous."

The serious aspect of the cited case to the rights of appellants in the cases at bar will become at once apparent.

V.

SECTION 5842, COMPILED STATUTES NEBRASKA, 1922, AUTHORIZES THE BOARD TO SEEK AND ACT UPON ANY INFORMATION IT MAY OBTAIN FROM WHATEVER SOURCE, AND, THE NEBRASKA SUPREME COURT UNDER THE RULE OF C. & N. W. RY. CO. V. CITY OF ALBION, SUPRA, WOULD HOLD THAT THE BOARD IS NOT OBLIGED TO DISCLOSE SUCH INFORMATION NOR EMBODY IT IN A BILL OF EXCEPTIONS FOR REVIEW BY ERROR PROCEEDINGS, AND THERE IS NO WAY WHEREBY APPELLANT COULD CAUSE ALL THE FACTS, WHICH THE BOARD CONSIDERED, TO BE EMBRACED IN A BILL OF EXCEPTIONS FOR REVIEW.

This statute expressly provides:

> "The returns of railroad companies or corporations shall not be held to be conclusive as to the value of the property, but the state board of equalization and assessment shall, *from all the information which it is able to obtain*, including records of the Railway Commission or other regulatory body, find the true value of all such property, including tangible property and franchises, and shall assess the same on the same basis as other property is hereby required to be assessed. * * *"

The State Supreme Court holds in the *Albion* case,

supra, that with the Board of Equalization producing no evidence to support their judgment and with the only evidence in the record in favor of the railway company, yet, there will be considered to have been within the breast of the Board sufficient evidence to sustain its conclusion irrespective of the railway company's evidence.

This court has held in *C. B. & Q. R. R. Co.* v. *Babcock*, 204 U. S. 585, at page 593:

> "That it would be improper and is improper to call the members of the Board as witnesses and examine them concerning the consideration which induced them to make the valuation of railroads they determined upon."

The State Supreme Court has held in *State* v. *State Board of Equalization and Assessment*, 81 Neb. 139, 115 N. W. 789, *supra*, that the Board cannot be compelled by mandamus to make a record of any findings of fact in response to requests submitted to them by the railway company concerning the issues embraced in their order fixing value.

Section 5842 *of the Statutes*, as we have seen, expressly authorizes the State Board to roam far afield and seek whatever information they may and use it, without disclosing its nature to the railroad, as a basis for their conclusion.

We ask, how all of the evidence, or any substantial part of it, which may be the basis for an order of the State Board of Equalization and Assessment fixing the value of railroads for taxing purposes is to be preserved in a bill of exceptions for review on error proceeding? The Board is not obliged to reduce to writing or make a matter of record the information upon which it bases its conclusion of value. The members of the Board cannot be examined as to the source of their information

nor the reasons for their action. The Board cannot be compelled by mandamus to make any record of the facts upon which it claims to rest its conclusion of value. On error proceedings to the State Supreme Court on such a one-sided bill of exceptions what might appellants expect save a decision as was announced in the *Albion* case, *supra*, that, in the absence of any evidence produced by the Board and notwithstanding all the evidence produced by the railroad, the Board must be considered to have acted as appraisers of the property acting upon information and upon their knowledge of the property, and the fact alone that the record does not set forth the evidence upon which the Board acted will not render the assessment erroneous. It is clear therefore, that on error proceedings the State Supreme Court would not consider the action of the Board on its merits but would, as it has previously announced, confine itself to an inquiry as to whether the Board acted in the procedural manner prescribed by statute.

The only finding which the State Board has made as to the values of appellant's property is its resolution (Rec., p. 187) which is as follows:

> "Resolved, That We, The State Board of Equalization and Assessment, in regular session held for the purpose of valuing and assessing the railroads in the State of Nebraska for the purpose of taxation of their property in the said state and having given due and full consideration to the returns furnished said Board by the several railroad companies, and having taken into consideration the main tracks, side tracks, spur tracks, warehouse tracks, roadbed, right of way and depot grounds and all machinery, rolling stock, telegraph lines and instruments connected therewith, all material on hand and supplies, moneys, credits, franchises and all other property of said railroad companies, and having taken into consideration the gross and net earnings of said railroads, the total amount expended in operation

and maintenance, the dividends paid, the capital stock of each system or road, and the market value thereof, and the total amount of secured and unsecured indebtedness, and from all the information which we are able to obtain do hereby ascertain, appraise, fix and assess for the purpose of general taxation the full actual value of the property of each of the several systems or companies in the State of Nebraska, as hereinafter recited."

Then is set forth the individual valuations of the several railroads.

This sort of a resolution or findings is the only thing the statute requires the Board to make. The Supreme Court of the state says it is the only finding that the State Board can be compelled to make and that mandamus does not lie to require a more complete record. The State Supreme Court says that error must appear upon the face of the record. What error is it possible to show with such a record? While it is true that this resolution of the Board may be embraced in a bill of exceptions; yet it is an empty right. It affords no illumination as to why the Board fixed the valuation which was fixed. It affords no basis upon which the State Supreme Court could administer any remedy in favor of appellants upon a claim of overvaluation and discrimination. In the face of these admitted facts we submit that the remedy by way of error proceedings from the State Board of Equalization and Assessment to the Supreme Court would afford appellants no remedy whatever. Certainly it is not that full, adequate and complete remedy which the Code contemplates as depriving the Federal District Court of equity jurisdiction.

VI.

SECTION 5901, COMPILED STATUTES OF NEBRASKA FOR 1922, DOES NOT CONTEMPLATE THAT RAILROADS SHALL HAVE ANY HEARING BEFORE THE BOARD. NO NOTICE TO RAILROADS IS REQUIRED. NO OPPORTUNITY TO PRESENT EVIDENCE IS PROVIDED FOR. IT IS ONLY BY GRACE OF THE BOARD THAT RAILROADS WOULD HAVE OPPORTUNITY TO OFFER EVIDENCE OF ANY KIND TO BE PRESERVED BY BILL OF EXCEPTIONS FOR ERROR PROCEEDINGS.

Let us analyze the section. It says:

> "The State Board of Equalization and Assessment shall, on the first Monday of July of each year, meet at the state capitol for the purpose of equalizing assessments."

Up to that point the statute provides for the time and place of meeting. Let us proceed:

> "They shall proceed to examine the abstracts of property assessed for taxation in the several counties of the state, including the railroads entirely within such county, and all other property, and shall equalize such assessment so as to make the same conform to law, and for that purpose they shall have the power to increase or decrease the assessed valuation of any county or tax district, and such increase or decrease shall be made by a percentum, and the percent of increase or decrease when made shall be certified to the county clerk of the proper county, who shall thereupon add to or deduct from the assessment of each piece or parcel of property in the county affected an amount equal to the per cent of increase or decrease fixed by the State Board."

That language fixes the duties of the Board. What are they to act upon? Why clearly they are to consider the abstracts furnished by the various counties of the state and these abstracts furnished by the counties are

to include railroads entirely within such counties. That language, with reference to railroads, was placed in this section because of the existence of one little railroad which lay entirely within one county in the state. It has no reference to railroads generally because other sections of the statute require that the State Board of Equalization and Assessment shall fix the valuation of railroads. Of course, the valuation of railroads generally is included in the abstracts from the counties because it has already been certified, previously in the month of May, to the county clerks and that valuation is returned by the county clerks as a part of their abstracts of assessments for the county. But up to this point in the statute there is no suggestion that railroads, coming individually, have a right to be before the Board to present evidence either as to over valuation or as to discrimination. The Board sits in star-chamber examining the abstracts from the counties. Then the statute proceeds:

> "The State Board shall have the power, in equalizing assessments, to increase or decrease the assessed valuation of any class, classes or kinds of property in any county or tax district, whenever in their judgment it shall be necessary to make such assessment conform to law."

That language, in our opinion, gives to the State Board the power in equalizing assessments to raise or lower the valuation of railroads in any county of the state so as to put them on a par with the valuation of other classes of property. For example, if the railroad property in any county is assessed at 100 per cent of its value and the abstracts of assessment show that other property is assessed at a different percentage then the State Board might raise or lower one class of property or the other so as to put them on a basis of equality. But what is the source of the Board's information for the purpose of

such action? Why clearly the only thing the statute contemplates the Board shall have before it is the abstracts from the counties. These abstracts show nothing which would prove a discrimination as against or in favor of one or more classes of property within the particular county covered by the abstract. The Board would find it possible to draw a comparison between valuations as between the different counties but there would be no information on the abstract to advise the Board of any discrimination between railroads and other property within a particular county. So far there is nothing in the statute which contemplates that the Board shall receive outside evidence from any source for the purpose of arriving at an equalization basis. They are to equalize based upon the abstracts from the counties before them. The only information concerning railroad valuations generally to be found in those abstracts is the identical information the Board, sitting as a Board of Assessment in May previously, has already furnished to the county clerks. Now the Board, after considering these abstracts from the various counties, has some further duties to perform. The statute proceeds:

> "In the event it shall appear to the State Board of Equalization and Assessment that a just, equitable and legal assessment of the property in the State cannot be made without increasing or decreasing the valuation as returned by any county, the Board of Equalization and Assessment shall issue a notice to the counties which the Board deems either undervalued or overvalued and shall set a date for hearing at least five days following the mailing of such notice."

Now what is the Board to do? Is it to notify the railroads that they have been overvalued as compared to others? Clearly not. The only notice provided for is to the counties. This is for the purpose of a hearing as

between the counties as such. There is no notice for any hearing of railroads. There is no contemplation in the statute that railroads as individual taxpayers have any rights before the Board.

The statute proceeds:

> "At such hearing legal representatives *of the counties* may appear and show cause why the valuation or valuations *of their county* should not be increased or decreased by the State Board, and after a full hearing, the State Board shall enter its order and certify same to the county clerks of the proper counties as hereinbefore set forth in this section."

There we have the only notice to anybody who has a right to come before the Board. It is a notice to the counties. The hearing is to be a county hearing. One county as against another county. The individual taxpayer is not to be notified. Clearly the railroads are not to be notified. They are not mentioned as entitled to any notice. If there were any doubt on this subject the following language of the statute makes it clear:

> "The notice provided for in this section shall be mailed to the county clerk, county assessor, and chairman of the county board."

Where is there any provision for notifying the railroads to come into court before the Board and make their complaint, present evidence, or defend themselves or their property in any way? There is none. The foregoing quotatons from the statutes constitute the entire procedure before the Board of Equalization. Can anyone assert from these quotations and from a study of this language that railroads have any right to be heard before the Board of Equalization and Assessment? Does the statute say anything about the right to go before the Board and present evidence and preserve a bill of exceptions of that evidence? Certainly there is no such right. Whatever hearing the railroads have is by their

own request. It is not given them by statute. Whatever evidence the railroads might present would be solely by the grace of the members of the Board. The railroads have no right to present evidence before the Board which the statute recognizes. Does this constitute even the beginning of due process of law? Does it constitute even the beginning of a remedy at law for an overvaluation as compared to other property in the State, or for an overvaluation *per se* of the railroad property? It seems to us no one can seriously claim that it does.

Next it is claimed by defendants and the District Court so held, that a federal court of equity has no jurisdiction in this case because there was an adequate remedy at law by way of error proceedings to the Supreme Court from any final decision of the Board. Here is the language of the statute:

> "From any final decision of the State Board of Equalization and Assessment, any person, county or municipality affected thereby may prosecute a writ of error to the Supreme Court and upon demand therefor the State Board shall prepare and certify a transcript of its records and proceedings involved in such decision, upon payment by the party demanding the same of a fee of ten cents for this work."

In order to understand who is contemplated as having the right to prosecute error proceedings from the order of the Board it is surely necessary to inquire what persons or corporations were present before the Board within the contemplation of the statute. Who are they? Clearly it was the persons to whom the Board had given notice. Who are those persons? The statute says:

> "The Board of Equalization and Assessment shall issue a notice to the counties."

Who is to appear before the Board in response to such a notice? The statute says:

> "At such hearing legal representatives of the counties may appear."

What individuals or persons are to receive this notice from the Board? The statute says:

> "The notice provided for in this section shall be mailed to the county clerk, county assessor and chairman of the county board."

In other words the counties and their officials named in the statute are the persons and the only persons the statute contemplates shall be heard before the Board and it follows that the remedy by way of error proceedings provided for in this section is to be taken by those persons and organizations which have had a hearing before the Board, namely: the counties, or the county clerk, the county assessor or the chairman of the county board. Those are the individuals who have been before the Board. Those are the only individuals the statute contemplates shall have any notice of any action to be taken by the Board. Clearly they are the ones the statute contemplates may prosecute error proceedings. There is nothing in the statute which contemplates that the railroads shall have any right to a hearing before the Board and clearly the provisions for error proceedings were not meant to give to railroad companies as individual taxpayers any right to prosecute error proceedings from the action of the Board sitting as a Board of Equalization.

We think therefore, that a careful reading of the statute demonstrates that the statute not only does not provide an adequate remedy at law for appellants as individual taxpayers who have been sinned agains by the State Board of Equalization through overvaluation of their property and through discrimination by undervaluation of the property of all others in the State but that the statute gives no remedy at all to appellants.

VII.

WHERE, AS IN NEBRASKA, THE ORDER OF THE STATE BOARD OF EQUALIZATION AND ASSESSMENT FIXING RAILROAD VALUATIONS FOR TAXATION, IS HELD BY THE HIGHEST COURT OF THE STATE TO BE A FINAL ORDER, AND THE STATUTE AFFORDS NO FURTHER PROCEDURE FOR INQUIRING INTO THE AMOUNT OF THE VALUATION, THE VALIDITY OF THE ASSESSMENT MAY BE LITIGATED IN THE FEDERAL DISTRICT COURT OF EQUITY, THERE BEING THE REQUISITE DIVERSITY OF CITIZENSHIP AND JURISDICTIONAL AMOUNT INVOLVED.

We have seen from the decisions of the Nebraska Supreme Court that the order of the Board of Equalization fixing the valuation of railroads for taxation purposes is a final order. We have seen that the State Supreme Court denies any jurisdiction to inquire into the equity of the valuations prescribed by the Board but will limit its inquiries solely to the jurisdictional features of procedure to be followed by the Board. We have seen that the Supreme Court has no jurisdiction, under the Nebraska Constitution, to consider any questions except those of a judicial nature. It has no administrative or legislative power and cannot be granted any under the existing Nebraska Constitution. Therefore, it is clear that under the Nebraska decisions the order of the Board fixing the valuations of railroads presented a justiciable question. The valuation was final so far as the state laws are concerned when it was fixed by the Board. The question of its validity as a whole, therefore, was a justiciable question and triable in any court which has jurisdiction. A reference to some of the cases for purposes of illustration may be useful.

In *Bacon* v. *Rutland Railroad Co.* 232 U. S. 134, it is said in the syllabus:

"Although the state statute may permit an ap-

peal from an order of the State Railroad Commission to the Supreme Court of the State, if legislative powers have not been conferred upon that court, the railroad corporation is not obliged to take such an appeal in order to obtain relief from an order that violates the federal constitution. It may assert its rights at once in federal court. The constitution of Vermont does not confer legislative powers on the courts of that state, and the appeal given by sections 4599 and 4600 published statutes of 1909 from orders of the State Railroad Commission to the Supreme Court is a purely judicial remedy."

So in the case at bar, administrative and legislative functions are not conferred on the Nebraska Supreme Court by the Constitution of the State. That court can entertain only judicial issues. Even the remedy by way of error proceedings, however limited it may be, is a judicial remedy and where it is claimed that the order of the Board of Equalization denies to the appellant equal protection of the law under the Federal Constitution and there is diversity of citizenship and the requisite amount involved, the Federal District Court has jurisdiction to entertain a bill which seeks to avoid the order of the Board on the ground that it violates the Federal Constitution.

In the recent case of *Prendergast* v. *New York Telegraph Co.* 67 Law Ed. (U. S. Sup. Ct. Rep.), p. 516, it was claimed that a Federal District Court had no jurisdiction to entertain a bill in equity because there had been a failure to apply to the Commission which fixed rates claimed to be confiscatory for a rehearing and that there had been a failure to prosecute proceedings by way of certiorari to the courts of the State. The court said, syllabus 4:

"A suit to enjoin the enforcement of rates for public service as established by a public service commission may be maintained as soon as the rates are promulgated, if the Commission has final authority

in the rate making process, although no application has been made to the Commission for a rehearing, and the prescribed rates are merely temporary, if such application is not required by law."

In the opinion, at page 517 the court says:

"Upon the making by the Commission of the order in question the proceeding had reached the judicial stage entitling the company to resort to the court for relief. (Citing cases.) * * * Here the Commission is vested with the final legislative authority of the State in the rate making process; the authority exercised by the state courts upon a review by certiorari being purely judicial and having no legislative character."

Since the order of the Board of Equalization when it fixed the valuation of the railroads was a final order and completed the assessment process provided by the State Statutes, the result, if it violated the Constitution of the United States, might be enjoined in the federal court.

VIII.

THE ADEQUATE REMEDY AT LAW REFERRED TO IN SECTION 267 JUDICIAL CODE, AS DEPRIVING A FEDERAL COURT OF EQUITY OF JURISDICTION, MUST BE A REMEDY WHICH IS AVAILABLE IN THE FEDERAL COURT. IT IS NOT ENOUGH THAT A REMEDY AT LAW MAY EXIST IN THE STATE COURT.

In *Smyth* v. *Ames*, 169 U. S. 466, at page 516 this court says, with reference to a contention that because the State Statute gave to the complaining body a remedy before the Transportation Board that such remedy deprived the Circuit Court of the United States of equity jurisdiction.

"We cannot accept this view of the equity jurisdiction of the circuit courts of the United States. The adequacy or inadequacy of a remedy at law for the protection of the right of one entitled upon any

ground to invoke the powers of a federal court, is not to be conclusively determined by the statutes of a particular state in which such suit may be brought. One who is entitled to sue in the federal circuit court may invoke its jurisdiction in equity whenever the established principle and rules of equity permit such a suit in that court; and he cannot be deprived of that right by reason of his being allowed to sue at law in a state court on the same cause of action. * * * But if the case in its essence be one cognizable in equity, the plaintiff—the required value being in dispute—may invoke the equity powers of the proper circuit court of the United States whenever jurisdiction attaches by reason of divers citizenship or upon any other ground of federal jurisdiction."

In *St. Louis, San Francisco Railway Co.* v. *McElvain*, 253 Fed. 123, at pages 135 and 136 Judge Sanborn of the Circuit Court of Appeals for the Eighth Circuit says:

"And the adequate remedy at law, which will prevent the maintenance of a suit in equity in a federal court, is a remedy as practicable and efficient to the ends of justice and its prompt administration as the remedy in equity. *Boyce* v. *Grundy*, 3 Peters, 210, 215, 7 Law Ed. 655; *Oelrichs* v. *Spain*, 15 Law, 211, 228, 21 Law Ed. 433; *Hayden* v. *Thompson*, 71 Fed. 60, 63, 17 C. C. A. 592; *Springfield Milling Co.* v. *Barnard and Leas Mfg. Co.* 81 Fed. 261, 265, 26 C. C. A. 389; *Rogers* v. *Penobscot Mining Co.* 154 Fed. 606, 613, 83 C. C. A. 380.

Moreover, it is such a remedy in a federal court only that will prevent the maintenance of a suit in equity in a national court. The fact that there may be such a remedy in a state court is not material. (Citing cases.) *Smyth* v. *Ames*, 169 U. S. 466, 516, 18 Sup. Ct. 418, 42 Law Ed. 819; *Arrowsmith* v. *Gleason*, 129 U. S. 86, 98, 9 Sup. Ct. Rep. 237, 32 Law Ed. 630; *National Surety Co.* v. *State Bank of Humboldt*, 120 Fed. 593, 602, 56 C. C. A. 657, 61 L. R. A. 394."

In the case of *Franklin County Treasurer* v. *Nevada California Power Co.*, 264 Fed. 643, the Circuit Court of

Appeals for the Ninth Circuit had before it a tax suit of the same character as the one at bar. In the syllabus the court says:

> "Under Judicial Code Section 267 providing that suits in equity shall not be sustained in any court of the United States in any case where a plain adequate and complete remedy may be had at law, the remedy at law to exclude equity jurisdiction must exist in the Federal Court."

These cases sufficiently illustrate the decisions on this point. If it were true that by prescribing a remedy at law in the State Courts the Federal Court of equity could be deprived of jurisdiction, States would no doubt become very diligent in prescribing some kind of a statutory remedy for every class of action which is now entertained in Federal Courts of equity. It was not the purpose of Congress in giving jurisdiction to the Federal Courts of controversies between citizens of different states where the amount involved exceeded $3,000 and the cause involved well recognized equitable principles that jurisdiction should nevertheless be defeated in the Federal Courts whenever, perchance, a state should enact a statute assuming to prescribe a remedy for the same wrong in the state court.

IX.

APPELLANTS HAD NO ADEQUATE REMEDY AT LAW IN THIS CASE, EVEN IF WE CONCEDE, FOR THE PURPOSES OF ARGUMENT, THAT ON ERROR PROCEEDINGS TO THE STATE SUPREME COURT A FULL SHOWING MIGHT HAVE BEEN POSSIBLE TO DEMONSTRATE THE INEQUALITY OF THE ASSESSMENT; BECAUSE, UNDER REPEATED HOLDINGS OF THAT COURT, THE ONLY REMEDY AFFORDED WOULD HAVE BEEN THE DIRECTION TO APPELLANTS TO APPLY TO THE VARIOUS COUNTY ASSESSING AUTHORITIES IN THIRTY-SEVEN DIFFERENT COUNTIES TO HAVE THE ASSESSMENT OF ALL OTHER TAXPAYERS RAISED UP TO THE LEVEL OF APPELLANTS' ASSESSMENT. BUT THE STATE SUPREME COURT WOULD NOT HAVE REDUCED THE ASSESSMENT.

The adequate remedy at law under consideration must be tested as of the time when the bills were filed. At the time the bills in this case were filed there were in Nebraska two decisions—*Lincoln Telephone Co.* v. *Johnson County,* 102 Neb. 254, and *Sioux City Bridge Co.* v. *Dakota County,* 105 Neb. 843, which represented at that time, and even at the time the cases were heard in the trial court, the settled policy of the State of Nebraska as announced by the decisions of the highest court of that State toward the individual taxpayer claiming he had been discriminated against by having his property valued at a higher percentage than the valuation fixed for other property for taxing purposes. Those decisions announce the rule that the remedy is not for the individual taxpayer complaining to have his assessment reduced to the level of the others so as to place him on an equality with them, but, the remedy there declared was for the individual taxpayer to go back to the assessing authorities in the counties and attempt to have

the property of all other taxpayers raised up to his own level. Therefore, notwithstanding any showing of inequality which might have been made before the State Board of Equalization and carried thence to the Supreme Court on error proceedings, the inevitable result, under the settled holdings of the Supreme Court of Nebraska, would have been the failure of appellants to get any relief in the State Court in these cases.

X.

THIS COURT HAS CONDEMNED SUCH REMEDY AS THE NEBRASKA SUPREME COURT POINTED OUT AS NO REMEDY AT ALL.

In *Sioux City Bridge Co.* v. *Dakota County*, 43 Sup. Ct. Rep. p. 190, 67 Law Ed. 220, this court says, after reviewing the federal decisions on the subject, p. 223:

> "The conclusion in these and other federal authorities is that such a result as that reached by the Supreme Court of Nebraska is to deny the injured taxpayer any remedy at all, because it is utterly impossible for him, by any judicial proceeding, to secure an increase in the assessment of the great mass of underassessed property in the taxing district. This court holds that the right of the taxpayer whose property alone is taxed at 100 per cent of its true value is to have his assessment reduced to the percentage of that value at which others are taxed, even though this is a departure from the requirement of statutes. The conclusion is based on the principle that where it is impossible to secure both the standards of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law. In substance and effect, the decision of the Nebraska Supreme Court upholds the violation of the Fourteenth Amendment to the injury of the bridge company. We must, therefore, reverse its judgment."

It seems to us that it cannot be denied that appallants were without any remedy at law whatever, in the state court, by virtue of these adverse decisions of the highest court of the state on the subject. No matter what procedure had been followed to bring into the highest court of the state appellants' claim of overvaluation and discrimination the state court would have denied relief. Such was the condition of Nebraska law at the time the bills were filed and at the time the cases were heard in the trial court. The Nebraska decisions have been overruled in accordance with the holding of this court in the Bridge Company case since the case at bar was heard in the District Court.

Cases Cited by Appellees.

The cases relied upon in the court below by counsel for appellees are clearly distinguishable from the case at bar; and the failure so to distinguish them led the learned trial judges into error. We will refer to some of these cases as briefly as possible.

1. *Keokuk & Hamilton Bridge Co.* v. *Salm, et al.* 258 U. S. 122.

In this case it was held that the bill was without equity for three reasons: (1) Because the law of Illinois afforded ample opportunity to question the amount and the validity of an assessment, both before administrative tribunals and in its courts; (2) the plaintiff did not apply to the Board of Review to correct the assessment; (3) there was no offer to pay such amount of plaintiff's taxes as the court should find to be justly and equitably due. The last two bases of the opinion are not presented here because appellant did appear before the State Board of Equalization and present proof, and it

has offered in its bill to pay such amount of the taxes as the court may find to be justly due. (Rec., p. 14.)

Upon authority of the cases cited in the opinion the proceedings in Illinois for assessment of property for taxation are never complete until final judgment of the court is entered in the collection of the tax; the proceedings for the collection of the tax is a civil suit; and the property owner may appear in such suit and defend on any legal ground, including that of the fraudulent and discriminatory assessment. Provision is made for an appeal to the Supreme Court of Illinois from the judgment in the tax collection proceedings and a *supersedeas* issues and the property owner is fully protected in the payment of taxes pending such appeal. The proceedings for assessment merge into the proceeding for collection and the whole matter of the validity of the assessment is open for full review upon trial *de novo*.

In Nebraska, on the contrary, the assessment is complete when the State Board of Equalization certifies the result of its action to the various county clerks. No right of appeal from the determination of the state board is offered. No forum is open in which the alleged discriminatory and fraudulent assessment may be assailed and proof of its nature revealed. No trial *de novo* may be had. All that is given is the naked right to a writ of error to the Supreme Court, which, as we have endeavored to show, is a remedy without form or substance and affording no opportunity whatever for relief.

2. *Pittsburgh, etc., Ry. Co.* v. *Board of Public Works*, 172 U. S. 32.

This case involved a tax upon a railroad bridge spanning a boundary river between the states of West Virginia and Ohio. Plaintiff contended that the bridge had been assessed in West Virginia as a separate structure

and also as a part of its railway in that state, thus amounting to a double assessment. The final assessment of railroads in West Virginia is made by the Board of Public Works. Provision is made for a full hearing before such Board. From its final decision an appeal may be taken to the Circuit Court. Upon such appeal a trial *de novo* is had, and after full hearing the court is, by statute, authorized to correct the assessment, if it is found to be too high or too low, and to ascertain and fix the true value of the property according to the facts proved and to certify such value to the auditor. This procedure was by this court properly held to afford a convenient and adequate remedy for any error in the assessment.

The comprehensive scope of the proceedings upon appeal distinguishes the above case from the one before us. Section 5901 of Nebraska Statutes affords no such right of appeal. The scope of review upon writ of error is limited and the construction to be given the remedy is uncertain and doubtful, thus making clearly applicable the rule announced in *Pacific R. Co.* v. *Weld County*, 247 U. S. 282.

3. *Indiana Manufacturing Co.* v. *Koehne*, 188 U. S. 681.

In this case an alleged illegal assessment of certain letters patent was involved. Specific provision had been made in the Statutes of Indiana for the payment under protest of taxes so claimed to be void and for their recovery back in a civil suit. This remedy was held to be adequate and complete.

Such rule is not applicable here because no such right of recovery of taxes paid under protest is claimed by appellees to have been open to appellant. Furthermore, the remedy by payment under protest and recovery back is applicable only "where the assessment is wholly void

or void with respect to separable portions of the property the amount collected on which is ascertainable." *Stanley* v. *Supervisors of Albany*, 121 U. S. 535.

4. *Burrill* v. *Locomobile Co.* 258 U. S. 34.

This was an action brought in the Federal District Court to recover taxes claimed to have been paid under duress. It was contended by plaintiff that the taxes were illegal because levied under a statute which had been adjudged unconstitutional. The defendant claimed the taxes were collected under an entirely different statute which had been sustained. The Massachusetts Statutes provided a distinct remedy in such a case by petition to the Supreme Judicial Court in which recovery of illegal taxes might be had. It was held that such remedy was exclusive and barred a personal suit against the collecting treasurer. The remedy was held to be "adequate and backed by the responsibility of the state." This was not a suit in equity but an action at common law in the Federal Court, which this court held to be governed by the laws of Massachusetts, there being no conflicting practice provisions in the Federal Court or statutes.

Such a case is so far removed from the principle we are considering as to merit no further analysis.

5. *Missouri Pacific R. Co.* v. *Conway & Vilona Road District*, 280 Fed. 401.

In this case, as in those already considered, the remedy by appeal and for a trial upon the merits was specifically provided as a part of the state's taxing machinery. It is distinguishable upon the same grounds as the others.

As the foregoing cases are typical of others upon which appellees rely, we deem it unnecessary to make

specific reference to such other cases. They all relate to remedies entirely different than that provided by Nebraska statutes, and each afforded opportunity for a full hearing in a judicial proceeding where complete relief could be promptly awarded. In this distinction lies the error of the trial court.

Compare briefly the situations presented in these cases with that in the one before us. Here, as has been shown, a deliberate, systematic and long-continued practice has prevailed in Nebraska of placing upon appellant and other railroads an undue and disproportionate share of the burdens of taxation. To such extent had the practice developed of valuing railroad properties at their full value and in excess thereof, and other properties at only a fraction of their values, that it may be said to have become the settled policy of the state. That such a scheme of taxation violates the very foundations of property rights, is apparent and will not be denied. The Supreme Court of Nebraska had in recent decisions definitely announced that the only relief to be accorded to a property owner so unjustly dealt with was to apply to the various county assessing officers to have the assessments of all other taxpayers raised to the level of his own.

Lincoln Telephone Co. v. *Johnson County*, 102 Neb. 254, 166 N. W. 627 (decided March 1, 1918).

Sioux City Bridge Co. v. *Dakota County*, 105 Neb. 843, 182 N. W. 485 (decided March 25, 1921).

Such a remedy was but a mockery of justice and received no uncertain treatment and unqualified disapproval from this court in the *Sioux City Bridge Case* (43 Sup. Ct. Rep. 190).

But such was the law of Nebraska at the time of the decision of this case by the court below, and such is still the law of that state, except as its courts may be morally bound to hereafter follow the decision of the *Sioux City Bridge Case.*

With such an announced policy before it, the Legislature of Nebraska in 1921 enacted what is now Section 5901 of the Compiled Statutes of Nebraska, 1922 (Chap. 133, Laws of Neb., 1921, approved April 26, 1921). This law provided for a review upon writ of error by the Supreme Court of the proceedings of the State Board of Equalization. The legislature must have intended that such remedy would be subject to the interpretation theretofore announced by its Supreme Court in *Lincoln Telephone Co.* v. *Johnson County,* 102 Neb. 254, 166 N. W. 627 (decided March 1, 1918), and in *Sioux City Bridge Co.* v. *Dakota County,* 105 Neb. 843, 182 N. W. 485 (decided March 25, 1921). Certain it is that the Supreme Court of Nebraska would have adhered to its decision announced in the two cases last cited had this case been presented to it upon writ of error to the State Board of Equalization.

The procedure (if such it may be called) before the State Board of Equalization under Section 5901 is also of very doubtful application and of still less efficiency. As has been pointed out, no notice of the meetings of the state board were afforded to appellant, nor is any such notice required. It does not even contemplate the presence of appellant at such meetings, yet appellant, out of abundance of caution and in deference to state authority, did appear before the state board and presented its objections to the assessment and furnished evidence in support thereof. When the decision of the board was announced by which the inequalities and discriminations were confirmed, appellant was confronted

with the task of determining its remedy, and it must under the statute make its decision within ten days. Appellant knew of the various decisions of the Supreme Court of Nebraska as to its remedy for correcting unjust and discriminatory assessments. It knew that such a procedure was no remedy at all, and placed an impossible burden upon it. It could not know with assurance of the efficacy of the relief upon writ of error, except as similar procedure led to a conclusion that no relief could be expected. The Supreme Court of Nebraska had not construed or applied the new remedy and it was impossible to know just what the scope of the review would be. Under such circumstances, we submit it was justified in the conclusion that such procedure would receive the same nullifying construction as had been applied by the Supreme Court of Nebraska in the two cases referred to, and that therefore there was no remedy in the state courts.

We submit that appellant did all and more than the statutes of Nebraska called upon it to do, and lacking an adequate remedy in the state courts it sought protection of the Federal Court. No situation either of fact or of law at all comparable to this was presented in any of the cases upon which appellees will rely. No embarrassment of precedent can thus be urged to deny to appellant the relief which the injunctive process of the Federal Courts can alone afford.

Conclusion.

We have endeavored at some length to review the Nebraska decisions relating to error proceedings and to point out that such proceedings are so inadequate in tax cases of this nature that notwithstanding any kind of showing which the railroads might make before the

State Board of Equalization and assessment it would be insufficient to afford to the railroads any relief on a hearing before the Nebraska Supreme Court on error proceedings. We have endeavored to analyze that section of the Nebraska statutes which assume to give to parties interested the right to proceed from the State Board of Equalization and Assessment to the State Supreme Court by error proceedings, to show that such statute does not give to railroads as individual taxpayers any rights whatever. We have pointed out that under Nebraska decisions relating to discrimination in tax matters that even if appellants had proceeded to the Supreme Court of Nebraska by error proceedings or any other method whatever, even by a direct action in equity, they would have been denied relief in the state court.

It is apparent, we think, that appellants not only did not have any adequate remedy at law by way of error proceedings to the Supreme Court of the state, but they had no remedy at law whatever and it was the duty of the District Court, there being present diversity of citizenship and the requisite jurisdictional amount, to entertain the bill on its merits. The record shows that on the merits appellants were entitled to a temporary injunction, and indeed to a permanent injunction, against the overvaluation of their property and the undervaluation of the property of other taxpayers in all of the counties through which appellants operate, and that no less relief will preserve to appellants their rights under the Fourteenth Amendment to the Federal Constitution.

Appealing to this court as the last hope for the preservation of their rights under the Fourteenth Amendment to the Federal Constitution, appellants respectfully submit that the order of the District Court denying to

appellants a temporary injunction was contrary to law and should be reversed.

Respectfully submitted,

R. L. KENNEDY,
WYMER DRESSLER,
R. N. VAN DOREN,
Solicitors for Appellants.

JAMES B. SHEEAN,
F. W. SARGENT,
Of Counsel.